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No. 85-2029

In the Supreme Court of the United States

OCTOBER TERM, 1986

EDDIE PADIN,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a District Judge, upon receiving a communication from the jury which clearly demonstrates that the jury has misconstrued certain uncontradicted evidence, has an affirmative duty imposed by the Sixth Amendment right to jury trial, and the Fifth Amendment right to due process to correct the jury's error by reading testimony in addition to that requested by the jury?

2. Whether Petitioner, who held the leasehold on a house and who subscribed to the telephone therein, but who did not reside there at the time, had a reasonable expectation of privacy in making telephone calls to the party he left in charge of the premises, so that a law enforcement officer, legitimately on the premises for the limited purpose of preventing destruction of evidence pending issuance of a warrant to search those premises, is prevented by the Fourth Amendment from intercepting incoming telephone calls and provoking, by deception, statements he would not otherwise have obtained?

PARTIES TO PROCEEDINGS BELOW

Parties in the United States Court of Appeals for the Sixth Circuit, whose judgment is sought to be reviewed, were: The United States of America, Respondent herein; Eddie Padin, Petitioner herein; and Terrance Sweigart, Frank L. Carlin, Raymond T. Bottari and Robin L. Pettigrew.

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No.

EDDIE PADIN,

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v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Eddie Padin, prays that a Writ of Certiorari be issued to review the final judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on April 10, 1986.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (*United States* v. *Padin, et al.*, 6 Cir. 1986, —— F.2d ———), is as yet unreported, but is reproduced, *infra*, as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on April 10, 1986. This Petition is filed within sixty days of that judgment. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, * * *

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *

The Sixth Amendment to the Constitution of the United States provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * *

STATEMENT

Petitioner Eddie Padin and twelve others were charged in a five-count indictment returned by the United States Grand Jury for the Western District of Tennessee with various offenses against the narcotics laws of the United States (21 U.S.C. § 841, *et seq.*). The charges against seven co-defendants were disposed of prior to trial by dismissal or pleas of guilty; one co-defendant fled the jurisdiction, was apprehended during trial and entered a plea of guilty during the trial of Padin and the remaining four co-defendants.

That trial (exclusive of jury selection and the hearing of pre-trial motions) commenced before the Honorable Odell Horton, Judge of the United States District Court for the Western District of Tennessee, and a jury, on September 5, 1984; the issues were submitted to the jury on September 17, 1984; the jury returned its verdicts on September 18, 1984.

Padin, who had been charged with various of the other defendants in Count One with conspiracy and in Counts Two and Five with the substantive offenses of possessing and/or distributing cocaine on November 29, 1983 and January 20, 1984, respectively, in violation of 21 U.S.C. § 841(a)(I), was acquitted by the jury of the two substantive offenses, but convicted of the conspiracy. Other defendants were convicted of various combinations of charges.

Following denial of his post-trial motions, Padin was sentenced to a term of ten years and to pay a "committed" fine of $10,000.00.

On October 16, 1983, Frank Carlin, national president of the Iron Horsemen Motorcycle Club, his girlfriend, and the wife of co-defendant Robin Pettigrew, rented two rooms under Carlin's name at the Memphis Airport Hilton Hotel. On October 20, Padin and his then girlfriend Gayle rented and occupied a third room. These three rooms, which were kept until October 24, were paid for by a charge to Padin's American Express credit card.

During this period, John Kresser and Jamie McCloud, co-defendants, who had worked together in purchasing, repackaging and reselling small quantities of cocaine for some period of time, and who, after apprehension in this case, became principal government witnesses, purchased quarter or half ounce quantities of cocaine from Carlin. On two occasions Padin, in Carlin's absence provided cocaine for these two from amounts that were maintained and measured in Carlin's room. Also, on one or two occasions when the residents of the hotel and other friends partied there, Padin shared his personal supply of cocaine with those who were partying.

In mid-October, Padin rented a house at 5162 Skippy Street, Memphis. At first, Padin, his girlfriend, Frank Carlin and his girlfriend lived in the house. Padin subscribed to the telephone in the house, and it was listed in his name. Sometime in November, co-defendants Sweigart and Smock (Jamie McCloud's daughter), moved into the house. Padin lived in the house until approximately Thanksgiving, 1983, at which time he returned to Chicago. Nonetheless, Padin continued to make, either in person or through a representative, payments on the lease and he continued to subscribe to the telephone on the premises.

Kresser and McCloud picked up their supplies of cocaine from the house on Skippy Street. Kresser himself purchased cocaine once from Carlin and twice from Sweigart after the move to Skippy Street. When Carlin objected to Kresser's frequenting the house, Kresser sent McCloud, who purchased cocaine at least three times from Carlin and either once or twice a week from Sweigart.

No witness testified to purchasing cocaine at Skippy Street from Padin, or while Padin was present. However, while he lived at the house, Padin was known to have used small gram amounts of his own cocaine under circumstances similar to the partying that took place at the Airport Hilton Hotel.

Generally, cocaine was shipped via Federal Express to Carlin, his son, Golden, and others. The packages were shipped by "Dave's Harley," 4611 South Talman, Chicago, Illinois and were picked up at the Federal Express office by those to whom they were addressed and then brought to the Skippy Street address. These shipments via Federal Express were discontinued after December 15, 1983, when Golden Carlin was arrested by local authorities when he appeared at the Federal Express terminal to accept delivery of a package containing cocaine.

In November, 1983, Kresser and McCloud were introduced to DEA Undercover Agent Kelly Goodowens, to whom they sold an ounce of cocaine, which they claimed came from Skippy Street, on November 29, 1983. Count Two, in which Padin was charged, was based on this transaction. The jury found Padin not guitly of this charge.

On December 21, 1983, Kresser and McCloud sold two ounces of cocaine to Goodowens. Count Three was

based on this transaction. Although Kresser and McCloud claimed that they also obtained this cocaine from Skippy Street, Padin was not charged in this count.[1]

Sometime within the first ten days in January, Jamie McCloud went to Skippy Street to pick up cocaine for "a bunch of" Kresser's customers. While she was there, the defendant Pettigrew, who was from Indiana, told her that he was late getting to Memphis with the "snow" because of "the snow and mechanical difficulties." At this time, Pettigrew was playing pool with a man whom McCloud did not know. Sweigart then returned to the house and said something about being "glad they sent it with somebody with some brains because it was after New Year's Eve and * * * he objected to the fact that there was a ringer sent with him * * *"

At the time of the December 21 sale, Kresser and Goodowens had discussed a potential future sale of a substantial amount of cocaine. On January 17, Goodowens arranged with Kresser to purchase two pounds of cocaine on January 20 in Memphis. Kresser had previously mentioned to Carlin that he might have a deal for two pounds. Cariln had said that there should not be any problem in providing the cocaine. On either January 16 or 17, Kresser called Carlin in Indiana and told him that the two pound deal had been arranged. Carlin told Kresser he would have to telephone up north to see.

Kresser and McCloud met Goodowens as planned at noon on January 20. Kresser had learned from Carlin

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[1] Count Four was based on the December 15 arrest of Golden Carlin at the Federal Express office in Memphis, where he attempted to receive a package containing cocaine that had been shipped to him from "Dave's Harley" in Chicago. Padin was not charged in this count.

at 10:30 that morning that Carlin had the two pounds. The two pound sale was to be split. Goodowens displayed his "flash money" to Kresser; Kresser instructed McCloud to pick up one pound of cocaine; and McCloud went to Skippy Street

There, she met Frank Carlin and Ray Bottari, whom she said she had never seen before. She told Carlin what Kresser had told her to do. Carlin looked at Bottari and said it sounded okay to him. Bottari said okay. Carlin and Bottari then weighed out a pound, which they put into a plastic bag and then into a black cardboard box. The box was stuffed with sections of a Chicago newspaper, taped shut, put into a brown paper sack and given to McCloud.

McCloud returned to Goodowens and Kresser where, after she showed the cocaine to Goodowens, both she and Kresser were arrested by federal agents who were conducting a surveillance. Both Kresser and McCloud agreed to cooperate with the agents. They identified Skippy Street as the source of the cocaine. They also said that the second pound of cocaine was still at Skippy Street, that there were weapons in the house, and that the cocaine would be destroyed if McCloud did not return soon with the money from the sale of the first pound.

Kresser and McCloud were then driven to Skippy Street to point out the precise location of the house. At approximately 1:50 p.m., agents and local law enforcement officers effected a forcible entry to secure the premises while other agents returned to the Federal Building with Kresser and McCloud to obtain a search warrant.

A contingent of agents and local officers remained at the premises while the warrant was being obtained. The occupants of the house were searched for weapons and then detained in the den area of the home, but the house was not searched prior to the warrant's being issued.

The search warrant was issued and the officers at the house were so notified at 4:50 p.m. At approximately 3:30 p.m., the telephone at the house rang for the first time since the officers' entry. Deputy Sheriff Gerald Peterson answered it. DEA Agent Sprague described Peterson's manner while answering this call: "* * * I believe he put a southern drawl type, who do you want to talk to type conversation with the party calling." "* * * [H]e was attempting to solicit information from the party on the line and apparently trying to represent himself as being a person who was supposed to be at that residence instead of the police." Peterson had been selected to participate in this investigation and to enter the house because of his familiarity with the Iron Horsemen club members. After the occupants of the house were rounded up and placed in the den, Peterson remained in the general area encompassed by the den and the adjacent kitchen.

After the first call, either DEA Agent Sprague or Memphis Police Captain Holt told Peterson to answer all incoming calls and to make notes of any conversations he had with the callers, "just for the record." Peterson understood that these notes were to be used, possibly as evidence.

Between 3:30 and approximately 4:50 — when the officers at the house were advised that the United States Magistrate had issued a search warrant — Peterson an-

swered the phone five times.[2] On each of these occasions, except the first — which was a call from an unidentified woman, the caller, according to Peterson, voluntarily identified himself, in some fashion, without inquiry from Peterson. Thus, the second caller identified himself as "Shack" and said he wanted to speak to Terry; the third identified himself as "Fast" and asked to speak to Terry; the fourth said he was "Dan" and asked to speak to "Tat," or Terry; the sixth caller[3] said he was "Fast" and also asked to talk to Terry. Peterson told each of these callers that Terry, who was detained in the den at the time, was not at the house at the time of the call. This statement to the third caller evoked an inquiry whether Peterson knew "if my man from Chicago had arrived yet." Padin, who was known by the nickname "Fast," was identified as the person who made calls numbers three and six.

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[2] One other call was answered by Captain Holt, who called Peterson to the phone after he answered it. By the time Peterson got to the phone, the caller had been disconnected.

[3] The fifth call was answered by Captain Holt, who did not testify to that incident either during the motion to suppress, or at trial. See Note 2, *supra*.

REASONS FOR GRANTING THE WRIT

1. A District Judge has an affirmative duty to correct or clarify a jury's patent misconception of the evidence, when that misconception is demonstrated by a communication from the jury requesting factual information.

After approximately five hours deliberation over a two-day period, the jury requested "* * * to see the testimony where Jamie McCloud said the guys on Skippy were mad because a 'ringer' had been sent from Chicago with the cocaine. January 20 — 2 lb. deal." The request revealed a patently erroneous interpretation by the jury of the evidence submitted to it. No testimony such as that described in the note had been presented. What Jamie McCloud had said was that, approximately ten days prior to the two pound transaction of January 20, she had visited the house on Skippy Street to pick up cocaine for a number of Kresser's customers, had spoken to Pettigrew about problems in traveling from Indiana to Memphis, and had also spoken to Sweigart about his feelings concerning a "ringer" — an apparent reference to an unidentified person who was playing pool with Pettigrew at the time McCloud spoke to him.

An accurate interpretation of the evidence was critical to Padin's defense because evidence had been received which identified him as calling the house on Skippy Street on January 20 and inquiring whether his man from Chicago had yet arrived. If the jury believed that Bottari, whom McCloud had never seen before January 20, was the "ringer" referred to in her testimony, then the jury might also be misled into believing that Bottari had been sent

by Padin from Chicago with the cocaine as part of the alleged conspiracy.

Accordingly, counsel for Padin requested that the District Judge tell the jury "as much as possible about this, not only the transcript, but any portions of the transcript that would reflect that the jury was in error in believing that this was with reference to January 20th as well as in error in their thinking that this has to do with somebody coming from Chicago." (Tr. 1387-88) While the Court and counsel debated this and other positions, however, the jury sent a second note saying that it was "stuck" without the information it had requested. Thereafter, the Court had read to the jury an isolated portion of the direct examination only of Jamie McCloud. That portion which was read to the jury (Tr. 549-551, line 19; see also Tr. 1410-13) did not identify the date on which the conversation occurred, nor did it correct the error in the jury's announced belief that it related to the January 20 two pound transaction or the "ringer's" having come from Chicago with the cocaine. The District Judge also rejected counsel's request to instruct the jury to consider the read testimony together with all the other evidence. (Tr. 1414)

Such clarification was available from evidence which had already been received. On cross-examination, McCloud had admitted that this transaction took place within the first ten days in January. (Tr. 649) Nonetheless, the jury was not provided with even this basic information in order to cure their obvious factual error. Twenty minutes following the reading of the limited portion of McCloud's direct testimony, the jury returned its verdicts.

The Court of Appeals treated this issue as involving only the narrow question of whether the District Judge

abused his discretion in reading limited portions of the transcript to the jury. We respectfully submit that the issue is broader and involves more fundamental rights. At issue, we suggest, is the non-discretionary duty of a District Judge to insure the essence of the Sixth Amendment right to trial by jury, and the substance of the Fifth Amendment right to due process, by correcting fundamental factual errors when they are made apparent and when, as here, the question of error, or not, is not determined by the weight of one side or the other of contradictory evidence.

In this respect, the cases discussed by the Court of Appeals are of little help, for they do not address this problem. They speak, primarily, to the issue of whether or not testimony should be read to a jury. See, e.g., *United States* v. *Licavoli,* 725 F.2d 1040 (6th Cir. 1984), cert. den., 104 S. Ct. 3535; *United States* v. *Almonte,* 594 F.2d 261 (1st Cir. 1979); *United States* v. *Varsalona,* 710 F.2d 418 (8th Cir. 1983); *United States* v. *Nolan,* 700 F.2d 479 (9th Cir.), cert. den., 462 U.S. 1123 (1983).

On the other hand, this Court has clearly said that a District Judge has a "responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach* v. *United States,* 326 U.S. 607, 612-13 (1945). The Courts of Appeal have followed this direction, insofar as it applies to the duty of a District Judge to correct misinterpretations of the law. See, e.g., *United States* v. *Bolden,* 514 F.2d 1301 (D.C. Cir. 1975); *United States* v. *Peterson,* 513 F.2d 1133 (9th Cir. 1975); *United States* v. *Czarnecki,* 552 F.2d 698 (6th Cir. 1971).

District Judges have the authority to comment on the evidence, assuming proper cautionary instructions are given. *Quercia* v. *United States,* 289 U.S. 466, 470-1 (1933); *United States* v. *Jacoby-Gil,* 474 F.2d 1213, 1216 (9th Cir. 1973). In fact, in a different context, the Sixth Circuit itself has observed that it is the duty of a District Judge "to see that the issues are not obscured and that the testimony is not misunderstood." *United States* v. *Hickman,* 592 F.2d 931, 933 (6th Cir. 1979). This same standard should apply whenever a jury's question, legal or factual, evidences misunderstanding.

2. A law enforcement officer, legitimately on premises for the limited purpose of preventing the destruction of evidence pending application for and issuance of a warrant to search those premises, may not use that authority to intercept incoming telephone calls and to provoke, by deception, statements that were intended only for the occupant of the house or one answering the phone with the express permission of the occupant.

The issues presented by Officer Peterson's answering the phone at the house on Skippy Street, prior to issuance of the search warrant, and, by untruthfully stating that the person to whom the callers asked to speak was not on the premises, thus provoking further statements by the callers, have never been, to our knowledge, directly addressed by this Court or any federal court of review. In *Flaherty* v. *Arkansas,* 415 U.S. 995, 39 L.Ed.2d 893 (1974), Mr. Justice Douglas, joined by Mr. Justice Brennan and Mr. Justice Marshall, dissented from a denial of certiorari under circumstances that appear less egregious than here. There, state police officers were admitted to Flaherty's home as the result of a warrant issued to search that home for evidence of gambling. Once upon the premises, one of the officers

answered the phone, impersonating Flaherty. Wagers were accepted and the calls were recorded, even though the search warrant did not authorize the search and seizure of such calls. Although the Arkansas Supreme Court rejected petitioners' Fourth Amendment and Title III claims on the basis of the exemption contained in 18 U.S.C. §2511 (2)(c) for a "party" to a conversation, Mr. Justice Douglas pointed out that "[t]he party exception and the consent of a party exception must have their justification in the decisions of this Court. 'Bugged informer' cases have permitted the introduction of transmitted or recorded evidence, seized without a warrant, where the transmission or recording has been with the consent of a party to an oral communication." 39 L.Ed. 2d at 894. But, Mr. Justice Douglas continued, such cases (e.g., *Lopez* v. *United States,* 373 U.S. 427 (1963); *White* v. *United States,* 401 U.S. 745 (1971); and *Rathbun* v. *United States,* 355 U.S. 107 (1957)) do not deal with the instant problem. Each of the so-called "bugged informant" or "misplaced trust" cases (*e.g., Hoffa* v. *United States,* 385 U.S. 293 (1966); *United States* v. *Santillo,* 507 F.2d 629 (3d Cir. 1975)) deals with a situation in which the complaining party takes the risk of confiding in that individual. Here, Padin was deceived by Peterson's untruthful statement that Sweigart was not present and by the implicit statement that Sweigart had reposed trust in Peterson by allowing him to answer the telephone.

The Court of Appeals in this case concluded that Padin did not exhibit a subjective expectation of privacy in the telephone conversations (App. A, *infra,* p. 8a), and that, even assuming a subjective expectation of privacy, such an expectation could not be accepted as "reasonable." (App. A, *infra,* p. 8a) The first conclusion, we respectfully submit, fails to take into considera-

tion the fact that the incriminating aspect of the call — the inquiry whether "my man from Chicago had arrived yet" — was provoked only after Padin exhibited a subjective expectation of privacy by asking to speak to Sweigart, and Peterson diffused this expectation by answering untruthfully.

The Court of Appeals' second conclusion, that Padin's expectation of privacy was unreasonable, is based on its further conclusion that it was "unreasonable for Padin to attach an expectation of privacy to an indiscreet and incriminating conversation with an unidentified telephone conversationalist who accepted the call at a house known by him, Padin, to be a drug distribution center frequented by innumerable gang members and transient visitors." (App. A, *infra,* p. 9a) However, the undisputed evidence in this case was to the contrary. Carlin had told Kresser that he did not want Kresser frequenting the house. (Tr. 180) McCloud was accepted there primarily because her daughter resided there with Sweigart. (Tr. 529) There was no evidence that Padin was present in the house during the drug transactions described by Kresser and McCloud, or that he was aware that the house was "frequented by innumerable gang members and transient visitors." His request to speak to Sweigart on each occasion evinced a belief by him that the house, for which he was legally responsible, was primarily in Sweigart's control.

Mr. Justice Douglas, in *Flaherty,* concluded his dissent with the plaint that "[w]e have not yet reached the point where the people must use secret passwords to establish their identities when communicating by telephone." 39 L.Ed.2d at 895 This,

we respectfully submit, is the point to which the instant case has brought us. Given the right of law enforcement officers to enter constitutionally protected premises for the legitimate purpose of preventing the imminent destruction of evidence pending application for and issuance of a search warrant (*Brinegar* v. *United States,* 338 U.S. 160 (1949); *Roaden* v. *Kentucky,* 413 U.S. 496 (1973)), the problem is apt to occur with greater frequency. An authoritative ruling by this Court concerning the powers of law enforcement agents, who are on premises for a limited purpose to begin with, to answer telephones and provoke, by deception, statements to later be used in evidence, is needed.

CONCLUSION

For the above and foregoing reasons, Petitioner respectfully submits that the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Nos. 85-5115, 85-5116, 85-5117,
85-5118, 85-5119

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDDIE PADIN (85-5115),
TERRANCE SWEIGART (85-5116),
FRANK L. CARLIN (85-5117),
RAYMOND T. BOTTARI (85-5118),
ROBIN L. PETTIGREW (85-5119),

Defendants-Appellants.

On Appeal from the United States District Court for the Western District of Tennessee.

Decided and Filed April 10, 1986

Before ENGEL and KRUPANSKY, Circuit Judges; and SUHRHEINRICH, District Judge.*

KRUPANSKY, Circuit Judge. Appellants Eddie Padin (Padin), Terrance Sweigart (Sweigart), Frank LeRoy Carlin (Carlin), Raymond Theodore Bottari (Bottari) and Robin Lee Pettigrew (Pettigrew) appealed their convictions for various drug offenses in violation of 21 U.S.C. §§ 841, 846 and 18 U.S.C. § 2.

On October 16, 1983, appellant Carlin, national president of the Iron Horsemen Motorcycle Club (IHMC), his girlfriend, Amy Ladd (Ladd), and Marie Pettigrew,

* Hon. Richard F. Suhrheinrich, United States District Judge for the Eastern District of Michigan, sitting by designation.

wife of the appellant Robin Lee Pettigrew, rented two rooms at the Memphis Airport Hilton in Memphis, Tennessee. On October 20, 1983, appellant Padin and his then girlfriend, Gayle, rented a third room at the same hotel. The rooms at the Hilton were occupied until October 28, 1983.

While appellants Carlin and Padin were residing at the Hilton, John Kresser (Kresser), Jamie McCloud (McCloud), and appellant Sweigart purchased cocaine from them at the hotel. On October 24, 1983, Padin leased a five-bedroom house located at 5162 Skippy Street in Memphis, Tennessee (Skippy Street). The house was leased in Padin's name. The telephone was listed in Padin's name. Initially, the house was occupied by Padin, his girlfriend Gayle, and appellant Carlin and his girlfriend Ladd. Sometime in November, Sweigart and Christine Smock (Smock), who had been living at the Iron Horsemen clubhouse, moved into the house on Skippy Street

Padin resided in the Skippy Street house until approximately Thanksgiving of 1983 at which time he returned to Chicago. Nonetheless, Padin continued to regularly pay the rent either directly or through a representative. In addition, the Skippy Street telephone continued to be listed in his name.

During the relevant time period, cocaine was shipped via Federal Express to Carlin, Ladd, Smock, and Carlin's son, Golden Carlin, at the Skippy Street residence by "Dave's Harley", 4611 South Talman, Chicago, Illinois. Federal Express records also disclosed that packages had been shipped from Memphis to undisclosed locations by Padin and McCloud. Shipments of cocaine into Memphis, Tennessee via Federal Express were discontinued on December 15, 1983, upon the arrest of Golden Carlin at the Federal Express terminal when he appeared to accept delivery of a package containing cocaine.

On November 21, 1983, Kresser was introduced to DEA undercover agent Kelly Goodowens (Goodowens). There-

after, on November 29, 1983, Kresser and McCloud sold Goodowens one ounce of cocaine. Both Kresser and McCloud asserted that the cocaine came from Skippy Street.

Kresser and McCloud made a second sale of two ounces of cocaine to Goodowens on December 21, 1983. Following this sale, Goodowens, Kresser and McCloud discussed via telephone the possibility of a future sale of one pound or more of cocaine. Negotiations continued until January 17, 1984 when Goodowens arranged to purchase two pounds of cocaine on January 20 at Katie's Kitchen on Shelby Drive in Memphis.

On January 16 or 17, Kresser telephoned Carlin and finalized their plans. Carlin told Kresser that he would have to telephone "up north for the cocaine." The final price was $1,500 per ounce or $48,000.00.

At noon on January 20, 1984, McCloud and Kresser met Goodowens as planned at Katie's Kitchen. At that time, Goodowens and Kresser agreed to split the sale.[1] McCloud drove to the Skippy Street house where she met appellants Carlin and Bottari and related Kresser's instructions to Carlin. Bottari agreed to split the sale as directed by Kresser. Thereafter, Carlin and Bottari placed a plastic bag of cocaine into a black cardboard box, stuffed it with sections of a Chicago newspaper, and placed the box into a sack for delivery by McCloud.

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[1] In drug parlance, "splitting the sale" is a procedure that guards against non-performance by one or more of the parties. In general, the procedure involves a four-stage transaction whereby (1) the purchaser displays the purchase money to the seller, (2) The seller delivers one half of the cocaine, (3) the purchaser tenders one half of the purchase price, and (4) the seller returns with the second half of the cocaine at which time a simultaneous exchange of cocaine and money concludes the transaction.

McCloud returned to Katie's Kitchen with the package. Upon a pre-arranged signal, officers converged on the group and arrested Kresser and McCloud. Shortly thereafter, both Kresser and McCloud agreed to cooperate with government officials and identified the Skippy Street residence as the source of the cocaine. They also indicated that the second pound of cocaine was at Skippy Street, that there were weapons in the house, and that the cocaine would be destroyed if McCloud did not return within thirty minutes. McCloud, Kresser and the agents proceeded to Skippy Street and at approximately 1:50 p.m., agents and officers effected a forcible entry to secure the premises while a search warrant was being obtained. Although the occupants of the house were detained, the premises were not physically searched at that point in time.

Shortly thereafter, the telephone began to ring. Deputy Sheriff Gerald Peterson (Peterson) answered the first call. After the call was completed, Captain Joe Holt of the Memphis Police Department instructed Peterson to answer all incoming calls and to record in writing any conversations he had with the callers.

Approximately one hour and twenty minutes elapsed before officers at the house were advised by telephone that the United States Magistrate had issued a search warrant. During the time interval between the original entry and the issuance of the warrant, Peterson received two additional telephone calls from a caller who, without inquiry from Peterson, voluntarily identified himself as "Fast" and asked to speak to Terry.[2] The caller required no identification of the person answering the phone. Peterson informed "Fast" that Terry was not at the house. On one occasion the caller asked Peterson if he knew "if my man from Chicago had arrived yet."

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[2] Padin was known to members of the IHMC as "Fast Eddie".

Upon execution of the search warrant, Special DEA Agent Michael Childers (Childers) discovered one and a quarter pounds of cocaine in a hall closet. Peterson found three ounces of cocaine in a plastic bag on the top shelf of a bookcase in the downstairs bedroom. Several weapons were also seized.

DEA Agent Thomas Sprague (Sprague) and FBI Agent Corbett Hart (Hart) interviewed McCloud on January 25, 1984, five days after McCloud's arrest and the search of the premises on Skippy Street. Sprague was the principal interrogator and made notes of the interview. He requested McCloud to briefly summarize her involvement in the conspiracy and thereafter directed her to respond to a series of questions. Sprague editorialized in written form the substance of McCloud's responses to his specific inquiries. His notations did not take the form of a verbatim question and answer record. When Sprague concluded his interrogation of McCloud, he did not review his notes with her. Subsequently, he used the notes to dictate a debriefing report.

All five appellants were named in Count I of the indictment and charged with conspiring to possess and distribute cocaine. Thirty-seven overt acts were enumerated in Count I. Count II charged appellants Padin and Carlin with possession and distribution of cocaine in connection with the November 29, 1983 sale to Goodowens. Carlin was also charged in counts III and IV with possession and distribution as a result of the December 15, 1983 Federal Express delivery and the December 21, 1983 sale to Goodowens. Count V charged all five appellants with possession and distribution arising from the sale to Goodowens on January 20, 1984.

Carlin was convicted on all five counts of the indictment. Bottari and Sweigart were convicted on counts I and V. Both Padin and Pettigrew were convicted on the conspiracy count, but were acquitted on all other substantive charges.

On appeal, appellant Padin charged that the district court erred in failing to suppress the incriminating statements he made via the telephone subsequent to the government's entry into the Skippy Street house, but prior to the issuance of the search warrant. The district court denied appellant's motion to suppress, concluding that Padin had failed to demonstrate a reasonable expectation of privacy in the telephone conversation at issue.

In his motion to suppress, Padin admitted that he had not resided at Skippy Street for "a substantial period of time" prior to the January 20, 1983 warrantless entry and that he had "permitted others to reside in said premises and to have primary control thereof." Padin asserted that because of his retained right of entry and possession insured by his leasehold interest and because the listing to the telephone at Skippy Street continued in his name, he had an ongoing reasonable expectation of privacy in the premises and the interception of his telephone calls constituted a "search" which infringed his Fourth Amendment rights.

The Fourth Amendment provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. Amend. IV. In *Katz* v. *United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the court delineated the elements to be considered in determining whether police conduct resulted in a Fourth Amendment "search."

In *Katz,* government agents had intercepted a telephone conversation by attaching an electronic listening device to the outside of a public phone booth. The Court rejected the government's argument that a "search" had not occurred because there had not been a physical intrusion into a "constitutionally protected area", stating:

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his on home or office, is not a subject of

> Fourth Amendment protection. See *Lewis* v. *United States,* 385 U.S. 206, 210, 87 S.Ct. 424, 427, 17 L.Ed. 2d 312; *United States* v. *Lee,* 274 U.S. 559, 563, 47 S.Ct. 746, 748, 71 L.Ed. 1202. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. See *Rios* v. *United States,* 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688; Ex parte *Jackson,* 96 U.S. 727, 733, 24 L.Ed. 877.

Katz, 389 U.S. at 351-52. In defining the criteria to be applied in determining whether a Fourth Amendment "search" had taken place, the Court concluded that governmental intrusion would constitute a search and seizure within the Fourth Amendment only if it "violated the privacy upon which [the defendant] justifiably relied." *Katz,* 389 U.S. at 353.

In *Smith* v. *Maryland,* 442 U.S. 735, 740-41 (1979), the Court noted that an evaluation of governmental action asserted to have impinged upon an individual's reasonable expectation of privacy embraced consideration of two discrete questions:

> The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy," 389 U.S., at 361, 88 S.Ct., at 516—whether, in the words of the *Katz* majority, the individual has shown that "he seeks to preserve [something] as private." *Id.,* at 351, 88 S.Ct., at 511. The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable,'" *id.,* at 361, 88 S.Ct. at 516—whether, in the words of the *Katz* majority, the individual's expectation, viewed objectively, is "justifiable" under the circumstances. *Id.,* at 353, 88 S.Ct., 512 *See Rakas* v. *Illinois,* 439 U.S. at 143-144 n.12, 99 S.Ct. at 430; *id.,* at 1512, 99 S.Ct., at 434 (concurring opinion); *United States* v. *White,* 401 U.S., at 752, 91 S.Ct. at 1126 (plurality opinion).

See also United States v. *Knotts,* 460 U.S. 276, 103 S.Ct. 1081, 1085 (1983).

In the present case, Padin urged that he exhibited a reasonable expectation of privacy when he telephoned the Skippy House because of his leasehold interest in the premises and the telephone directory listing that he had retained in his name and the ultimate control he asserted over the premises, albeit as an absentee landlord. The government argued that since Padin failed to determine the identity of the answering individual before he voluntarily communicated his incriminating statements and had abandoned all objective precautionary safeguards which would have manifested his intent to protect the privacy of the conversation, he had not supported his asserted subjective expectation of privacy to the conversation.

It should also be noted that although Padin attempted to characterize Skippy House as his "home", the Skippy Street residence was not his residence. Rather, Padin had moved from the house approximately two months before the date of the search and had relinquished control of the premises to others. In addition to its use as a temporary residence for several gang members, Skippy Street was used as a drug distribution center. Because Padin had relinquished control over Skippy Street to various gang members, knew that the facility was being used as a drug distribution center, and, in the face of that knowledge, failed to determine the identity of his telephone conversationalist or impose any precautions calculated to ensure the confidentiality of the conversation at issue, this court cannot conclude that he exhibited a subjective expectation of privacy in the incriminating telephone conversation.

Moreover, even assuming arguendo that Padin had established a subjective expectation of privacy in the controversial telephone conversation, such an expectation could not be characterized as "one that society is prepared to recognize as 'reasonable.'" *Katz,* 389 U.S. at 361 (Harlan, J., concurring). In determining whether an as-

serted privacy interest in a telephone conversation is reasonable, the court must consider the objective realities of the circumstances attendant to the conversation at issue and balance the probability of maintaining the confidentiality between the parties to the conversation against the probability of a violation of the privacy intended to attach to the conversation by a disclosure to others.

In *United States* v. *Santillo,* 507 F.2d 629 (3d Cir. 1975) the Court indicated that the relationship between the parties to the conversation was one factor to be judged in evaluating the potential for a violation of confidentiality. Noting that "[t]he possibility of repetition is a well-known risk that the prudent man weighs before disclosing confidential information", the court refused to suppress a conversation between the defendant and an undercover federal agent because there existed between the two only a casual relationship. *Id.* at 631.

Correspondingly, the operative facts of the case at bar militate against a conclusion that Padin's expectation of privacy was reasonable under the attendant circumstances and this court concludes that it was unreasonable for Padin to attach an expectation of privacy to an indiscreet and incriminating conversation with an unidentified telephone conversationalist who accepted the call at a house known by him, Padin, to be a drug distribution center frequented by innumerable gang members and transient visitors.

Appellants also argued that the district court abused its discretion by reading excerpts of McCloud's direct testimony to the jury in response to its two written inquiries. On the second day of jury deliberations, the jury requested to review certain testimony given by McCloud which related to a "ringer." While the court was discussing the first inquiry with counsel, the jury submitted a second written inquiry to the court. After conferring with counsel, the court read that part of McCloud's direct testimony dealing with a "ringer" to which appellants, on appeal, assigned error.

In reviewing a district court's decision to read testimony to the jury, this court is bound by an abuse of discretion standard. As this court noted in *United States* v. *Licavoli,* 725 F.2d 1040, 1049 (6th Cir. 1984), *cert. denied,* 104 S.Ct. 3535, "[i]t is within the judge's discretion to re-read testimony for a deliberating jury." In exercising that discretion, the court "can and should take into consideration the reasonableness of the jury's request and the difficulty of complying therewith." *United States* v. *Almonte,* 594 F.2d 261, 265 (1st Cir. 1979).

Reported cases recognize two inherent dangers in reading testimony to a jury during its deliberations. First, undue emphasis may be accorded such testimony. *United States* v. *Varsalona,* 710 F.2d 418, 421 (8th Cir. 1983); *United States* v. *Nolan,* 700 F.2d 479, 486 (9th Cir. 1983), *cert. denied,* 462 U.S. 1123 (1983). Second, the limited testimony that is reviewed may be taken out of context by the jury. *See, e.g., Government of Canal Zone* v. *Scott,* 502 F.2d 566, 570 (5th Cir. 1974). In *Henry* v. *United States,* 204 F.2d 817 (6th Cir. 1953), this circuit noted that these concerns are escalated after the jury had reported its inability to arrive at a verdict. In *Henry,* the court granted the jury's request to re-hear the recorded testimony of a number of witnesses. However, included in the mechanical replay of defendant's testimony were comments of the trial judge expressing his belief that the witnesses were testifying falsely. This court reversed and remanded the case for retrial, finding that the judge's comments could have influenced the guilty verdict. The *Henry* court stated at 820-21:

> After the jury has reported its inability to agree upon a verdict, it is, in our opinion, encumbent upon the trial judge to exercise extreme care in reopening the case for the introduction of further testimony or in permitting any evidence to be restated or re-read to the jurors. Unless restraint is exercised by the judge, it may well be that he would permit undue emphasis to be placed upon portions of the testimony, if such portions were called for by the jurors.

In the case at bar, the trial court examined the transcript and determined that specific and limited excerpts of McCloud's testimony responded to the jury's request. In the light of the foregoing, this court cannot conclude that the district court abused its discretion in complying with the jury's request.

Appellants Padin, Carlin, Sweigart, and Bottari also asserted that the district court erred in denying their Jencks Act request for production of DEA agent Sprague's debriefing report summarizing the McCloud interview. The Jencks Act, 18 U.S.C. § 3500, requires that, upon the motion of a defendant, the government must provide the defense with prior statements of testifying government witnesses which relate to the subject matter of the witness' testimony. 18 U.S.C. §3500(b). The term "statement" is specifically defined in the Act:

> (e) The term "statement", as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means—
>
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Appellants argued that the debriefing report prepared by Sprague qualified as a "statement[s]" for two reasons. First, appellants suggested that the Sprague report qualified as a "substantially verbatim recital" of McCloud's statements to him as defined in 18 U.S.C. § 3500(a)(2). Second, appellants asserted that the Sprague report was "otherwise adopted or approved" by McCloud as defined in 18 U.S.C. §3500(a)(1).

The Jencks Act was enacted in response to a fear that the Supreme Court's decision in *Jencks* v. *United States*, 353 U.S. 657 (1957) would be interpreted to "compel the undiscriminating production of agents' summaries of interviews regardless of their character or completeness." *Palermo* v. *United States*, 360 U.S. 343 (1957). In *Palermo*, the Supreme Court determined that in enacting the Jencks Act, Congress did not intend to permit the defense to indiscriminately impeach witnesses with statements which "could not fairly be said to be the witnesses' own words rather than the product of the investigator's selections, interpretations, and interpolations." 360 U.S. at 350. Rather, the *Palermo* Court concluded that the Jencks Act was directed to production of undistorted statements "which could properly be called the witness' own words." *Id.* at 352. Expressing its concerns, the Court stated that "[d]istortion can be the product of selectivity as well as the conscious or inadvertent infusion of the recorder's opinions or impressions." *Id.*

Sprague's debriefing report did not meet the *Palermo* standard prerequisite for production. His testimony at the suppression hearing clearly disclosed that he exercised editorial discretion by recording only those segments of McCloud's interview to which he assigned importance and relevance in lieu of a verbatim record of the interview.[3]

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[3] An *en camera* inspection of Sprague's debriefing report of the McCloud interview verified his suppression hearing testimony concerning the manner in which he composed the report. Moreover, the report disclosed no exculpatory material which the government would have been obliged to produce pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963). Upon this court's review of the controversial *en camera* documents, this court concurs with the refusal of the trial court to order the production of the material here in issue.

This court's *en camera* review of Kresser's statements made to investigatory agents confirmed that those statements contained no producible Jencks or Brady material.

It should also be noted that the U.S. Attorney professionally represented to this court that government files did not include notes or debriefing reports relating to any interview with Ladd.

Appellants would also qualify Sprague's work product as Jencks Act material because it was "signed or otherwise adopted or approved" by McCloud. The evidence disclosed that McCloud did not read or sign the report or was it ever read to her. Moreover, the statement cannot be considered to have been "adopted" by McCloud for the purposes of the Jencks Act since she was unfamiliar with its content and had not affirmatively approved it. *See. e.g., Goldberg* v. *United States,* 425 U.S. 94, 110 n.19 (The adoption requirement "clearly is not met when the lawyer does not read back, or the witness does not read, what the lawyer has written."). This court accordingly is of the opinion that McCloud did not clearly and unambiguously adopt the report since she neither signed, read, nor had it read to her.

Appellants Carlin and Sweigart charged the district court with an abuse of discretion in denying them the opportunity to effectively cross-examine government witness Christine Smock on issues of motive and bias. Smock lived at the Skippy Street house and was the girlfriend of appellant Sweigart. Her mother, Jamie McCloud, was also a witness for the prosecution.

Smock was named in the indictment and pleaded guilty to the charge of conspiracy. At trial, Smock was exhaustively cross-examined about her involvement in the conspiracy, her guilty plea and the details of her plea bargaining agreement. Smock admitted that she had sold cocaine, that she pled guilty to one count of the indictment, and that the prosecution had agreed not to oppose her probation or to charge her as a fugitive upon her failure to appear in response to the indictment issued against her.[4]

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[4] Following the initial arrests of the Skippy Street conspirators, Smock fled from the Memphis area. She was eventually arrested in Fort Lauderdale, Florida and returned to Memphis.

Counsel for appellants Carlin and Sweigart attempted, on cross-examination, to impeach Smock's credibility by demonstrating that her trial testimony was motivated by a desire to protect her mother's plea agreement from jeopardy. However, the evidence disclosed that she had not seen her mother in eight months and that she had no detailed knowledge of her mother's plea arrangement.

This circuit has emphasized that "cross-examination is a matter of right" and that the cross-examiner "must be given 'reasonable latitude' in developing facts tending to show that the testimony in chief was untrue or biased." *United States* v. *Touchstone*, 726 F.2d 116, 1122 (6th Cir. 1984) (*quoting Alford* v. *United States*, 282 U.S. 687, 690 (1931)). Despite the wide latitude to be accorded the right of cross-examination, the scope of cross-examination, nevertheless, is within the sound discretion of the trial judge. *Touchstone* at 1122.

Upon consideration of the record herein, this court concludes that the district court did not abuse its discretion in limiting the cross-examination undertaken by defendants Carlin and Sweigart. The proffered interrogation was directed to elicit information beyond the knowledge of the witness. Moreover, the permitted exhaustive cross-examination of Smock in all areas of her involvement in the conspiracy and the details of her own plea arrangement provided the jury with sufficient information to evaluate her credibility.

Appellants Sweigart and Carlin also challenged the trial court's ruling in permitting the government to identify the defendants and other members of the conspiracy by alluding to their respective nicknames. The gravamen of this assignment of error was that the court permitted prejudicial evidence of the appellants' lifestyles as members of a motorcycle gang to adversely influence the jury. However, the evidence developed during trial disclosed that the method of identification employed by the government

was essential because it was, in some instances, the only means available to the government to identify certain individuals whose actual names were unknown to witnesses. *Cf. United States* v. *Hattaway,* 740 F.2d 1419, 1425 (7th Cir.) *cert. denied,* — U.S. —, 105 S.Ct. 448 (1984) (Forbidding witness to use nicknames would have placed undue burden on her testimony).

Appellants Carlin and Sweigart also took exception to the introduction of their arrest photos asserting that the photos permitted the jury to visualize the defendants in their true character and as they appeared when arrested, thereby affording the prosecution the opportunity to depict them as Charles Manson-type bikers. However, as the Fifth Circuit noted in *United States* v. *Cochran,* 697 F.2d 600, 608 (5th Cir. 1983), "when a defendant appears at trial dressed in his Sunday best the prosecutor is entitled to show his appearance when arrested."

The remaining assignments of error advanced by the appellants are without substance and do not warrant comment.

For the reasons stated above, the judgment of the district court is hereby AFFIRMED.